LIBRARY
SUPREME COURT, U. S.

FILED
MAR 28 1975
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

No. 74—1146

CIA DE NAV. MAR. NETUMAR,

*Petitioner,*

*against*

JOAQUIM CONCEICAO, NEW JERSEY EXPORT MARINE CARPENTERS, INC., and INTERNATIONAL TERMINAL OPERATING CO., INC.,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LARKIN, WRENN AND CUMISKY
of Counsel to Coppola & D'Onofrio
*Attorneys for Respondent*
*New Jersey Export Marine Carpenters, Inc.*
11 Park Place
New York, New York 10007

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Statement | 1 |
| Issues | 1 |
| Facts | 2 |
| POINT I—Reason for denying petitioner certiorari as to respondent New Jersey Export | 7 |
| Conclusion | 8 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

No. 74—1146

CIA DE NAV. MAR. NETUMAR,

*Petitioner,*

*against*

JOAQUIM CONCEICAO, NEW JERSEY EXPORT MARINE CARPENTERS, INC., and INTERNATIONAL TERMINAL OPERATING CO., INC.,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

### Statement

The petitioner herein does not contest the holding of the Trial Court that the evidence supported the jury's finding that New Jersey Export Marine Carpenters, Inc., performed its duties in a workmanlike manner (A3 of Petition) or the affirmation of that holding made in the Second Circuit Court of Appeals (A10 of Petition).

### Issues

Whether the petitioner is not entitled to any further review of the judgment in favor of New Jersey Export Marine Carpenters, Inc.

Whether the petition should be denied as to New Jersey Export Marine Carpenters, Inc., no matter what disposition is made of the issues otherwise presented by petitioner herein.

## Facts

The subject accident occurred on November 5, 1970 aboard the S. S. Mosqueiro while berthed at Pier 36. As pertains to respondent New Jersey Export Marine Carpenters, Inc. (hereinafter called New Jersey Export), the following facts were developed on the trial of this action:

Richard Piper did not appear personally on trial but his pre-trial deposition was read into evidence. He testified that he was defendant shipowner's Port Captain on this vessel at the time of the occurrence of the accident in issue (A171-172).* He had the responsibility for its loading and unloading (A175), to coordinate storage, the ordering of labor and equipment therefor and the over-all supervision of the loading operation (A172). In conjunction with the ship's master and chief officer and with the approval of the stevedore, he proposed the stowage plan (A173).

Captain Piper testified on his examination before trial that since he had quite a bit of pipe to stow (A179), some days before this accident (A182) he verbally ordered from New Jersey Export, through its head foreman William Montella (A201-202), the construction of pipe cribs (A182). Captain Piper stated that he thought he ordered three cribs (A184). The order also included lashing the pipes to be performed by the carpenters after stowage was completed (A183). He said that the material listed on the New Jersey Export labor record was ordered only after consultation by the carpenter foreman with the Port Cap-

---

* (Numbers preceded by letter A indicates page reference of the Appendix on appeal in the Circuit Court of Appeals.)

tain (A321). He admitted that he did not specifically tell Montella that there were 41 pieces of pipe but he said "he gave him full booking of the vessel and left it up to him as to the number of areas he would require to stow it safely" (A185). Since the Port Captain never appeared on trial to explain the term to the Court, the meaning of "full booking of the vessel" is not known. Captain Piper also never testified that he ever told New Jersey Export or its employees of the weight of the pipes to be cribbed. He stated that New Jersey Export would determine the size and location of each bed when he told Montella the number of pieces, the dimensions and length of the pipe (A182-183, A184, A185-186).

William Montella, who did testify on trial, stated that Captain Piper verbally ordered not three but two cribs (A169, A202, A253). In accordance with direction (A253) the New Jersey Export foreman built these cribs, one on the port and one on the starboard side of Hatch #1 (A202). He definitely asserted that Piper never told him the number of pipes he had or their weight (A167-168, A252) and that he, Montella, never saw or had access to the stowage plan (A233-234) or the Port Captain's documents (A234-235). Montella stated that the Port Captain would order what he wanted (A234). When one or more pipe beds or cribs were ordered he always built them the same way depending for their size only upon the limitation of the space designated within which to construct the items (A168, A253-254, A255). It was Captain Piper who alone laid out the ship and informed Montella what he wanted done (A170, A234). Montella was not an engineer (A243). ITO's hatch boss stated that it was the stevedore who told him what cargo to put there (A81). In fact, this ITO witness testified that the carpenters, although in the area to lash the pipe on completion of stowing, never said anything to him about loading (A98, A106-107). The ITO maritime expert testified that the ship customarily should detail what it wants from the carpenter and tell that con-

tractor the size and weight of the cargo to be stowed and the carpenter then only orders such men and material as is required to do the job (A375-376).

William Montella testified that in building these cribs New Jersey Export under his direction laid 4 x 6" lengths of lumber on the deck from hatch combing to ship's rail about five feet apart. On either side of those he nailed 4 x 6" uprights with 4 x 6" fillers. Along the base of the uprights for the length of the crib which ran fore and aft of the ship he nailed one 4 x 6" whaler and he nailed another 42 inches above that. The entire structure was tied together by horizontal 2 x 4" or 2 x 10" lumber so that the finished product was firm (A203-204). The witness' description of this structure was substantially confirmed by plaintiff's testimony (A63-67). This witness stated that he used all new lumber (A204) and he had finished this construction the day before the accident (A204, A235). All witnesses agreed that the crib in issue had been completed and was empty on the morning of the accident (A42, A98, A124-125, A145, A182). Mr. Montella testified that this crib like all the others he fashioned was five feet high (A253). This height of the crib walls was corroborated by the other witnesses (A101-102, A308) with the exception of one witness who testified that the crib walls were about ten feet h'gh (A125-128). With five foot walls, this would leave the top of the crib walls about two to three feet above the coaming of the hatch (A51-52, A102, A128).

Captain White, the New Jersey expert witness, testified that the subject crib as built was adequate for its intended purpose to hold a reasonable load (A261-262, A296). Captain Wheeler, the International Terminal Operating Co., Inc., expert (hereinafter called ITO), testified that he could not give an opinion one way or the other about the sufficiency of the structure because he felt that he did not have enough details of its structure (A335-336). The ITO expert stated, however, that the crib was correct in ap-

pearance and did prove satisfactory during the two or three hours of stowage before the accident (A337). The defendant ship presented no evidence to challenge the propriety of this crib construction. There was not one word said on trial from which a finding could be made other than that the lumber and material used in this crib was of top grade.

The ITO maritime expert testified that after the crib was erected, it was the duty of the ship's personnel to make a detailed inspection for sufficiency (A331, A370-371). Thereafter, he said, the hatch boss is supposed to make only a visual inspection of the crib and load in it whatever he is told to by the ship foreman or the pier superintendent (A336-337, A338). He testified that the ship had an officer in over-all supervision of loading (A384-385). New Jersey Export maritime expert also testified that when the carpenters finish such a crib it is proper procedure that the vessel's officer inspects the product visually and by shaking it to see that it is solidly built (A267-269) and that the stevedore boss then makes a visual and physical inspection (A297-298). He said that the crib installations were subject to ship officers' approval (A267).

The loading operation, during which plaintiff's accident occurred, started the morning after (A26-27) the crib was completed (A42, A98, A124-125, A145, A182, A204, A235).

All motions made at the close of plaintiff's, the ship's and the entire case were denied by the Court (A190-200 A323-332, A391-393). It is interesting to note that the Court, in denying the ship's motion at the end of plaintiff's case, reminded the ship's attorney that there was no evidence to show that New Jersey Export was ever informed of the weight of the subject pipe and that the tetimony given by the ship's Port Captain indicated that he had not even told the carpenters of the number of pipes these cribs were to accommodate (A196-197). No further testimony or other proof was presented by the ship or the

plaintiff to supply this weakness in the proof after this shortcoming in their cases was pointed out to them.

In deciding the motions made by New Jersey Export against it at the end of plaintiff's case, the Court ruled that the law of the case would be that New Jersey Export owed the plaintiff the warranty of workmanlike performance and of strict liability since there was an issue that the carpentry contractor could have foreseen that longshoremen would be using the crib constructed by New Jersey Export in the manner in which they did (A192-193). Exception was taken to this ruling (A193).

The Court charged the law on the elements of plaintiff's action against the ship and New Jersey Export (A404-420). On the matter of the warranty owed by New Jersey Export to the plaintiff, the Court instructed that this defendant owed the plaintiff the duty to perform its assigned task in a workmanlike manner and to build a reasonably fit and safe pipe bed. Although the Court charged that the plaintiff had the burden of proof in this respect, the jury was also instructed that it was no defense to this cause of action that the plaintiff did not discover or correct the subject crib. The Court said that the plaintiff's claim could be defeated on this issue only if he seriously hampered or hindered New Jersey Export from doing its work properly (A421-422). The Jury was also given the question of whether the ship's conduct prevented New Jersey Export from doing its work in a workmanlike manner (A439).

The only exception to the charge as it referred to New Jersey Export was made by the plaintiff and the ship to the effect that the instructions of the Court on the issue of New Jersey Export warranty duty to the plaintiff was not strong enough (A448, A450).

The Jury returned findings that New Jersey Export was not negligent in causing plaintiff's accident and that New

Jersey Export did not breach its warranty of workmanlike performance owed to the plaintiff. Accordingly, a verdict was rendered in favor of New Jersey Export (A463-464).

## POINT I

**Reason for denying petitioner certiorari as to respondent New Jersey Export.**

The accident of Joaquim Conceicao occurred during a loading operation by the stevedore of pipes into a crib. The crib had been completed by the respondent New Jersey Export before the loading commenced. The jury was amply justified in finding that the subject crib had been soundly built according to specifications given the carpenter. The carpenter cannot be held liable for the conduct which occurred or the conditions coming into existence during the use of the crib after its proper construction had been completed by respondent New Jersey Export and it had been delivered to the ship (*Swain* v. *Boeing Airplane Company*, 337 F. 2d 940, cert. den. 380 U.S. 915).

The jury verdict as to the respondent New Jersey Export is unassailable on appeal since it is firmly based on the evidence (*Lavender* v. *Kora*, 327 U.S. 645, 653; *Atlantic and Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 358, 359).

No matter what other disposition is made of this petition, it should be denied as to respondent New Jersey Export. The carpenter's involvement in this action has nothing whatsoever to do with the facts or the law upon which petitioner relies for its request for further review.

## CONCLUSION

**There are no grounds for further review of the judgment in favor of New Jersey Export Marine Carpenters, Inc.**

Respectfully submitted,

LARKIN, WRENN AND CUMISKY
of Counsel to Coppola & D'Onofrio
*Attorneys for Respondent*
*New Jersey Export Marine Carpenters, Inc.*
11 Park Place
New York, New York 10007